80-827

No.

MICHAEL R

In the Supreme Court of the United States

October Term, 1980

ROBERT SCANLON,

Petitioner

vs.

PATRICIA SUE BATTLE, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

AMICUS CURIAE BRIEF OF THE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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CONSENT OF PARTIES

The parties have granted consent to the Pennsylvania School Boards Association, amicus curiae, to file the instant brief.

INTEREST OF THE AMICUS CURIAE

The Pennsylvania School Boards Association is a voluntary association composed of the five hundred and five (505) local school districts of the Commonwealth of Pennsylvania and the members of the school boards of those districts. The Pennsylvania School Boards Association was organized in 1895 and is the first such association in the nation and has as its function the rendering of assistance to local school districts and the representation of the general public interest in the field of public education.

The instant matter concerns the proper interpretation of the mandates of the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U.S.C. §1401 (hereinafter referred to as "94-142" or the "Act"). According to its own terms, 94-142 was enacted to "assure that all handicapped children have available to them . . . a free appropriate public education. . . ." 20 U.S.C. §1401, n. Within the scheme of public education and pursuant to state law, each of the five hundred and five (505) local school districts of the Commonwealth of Pennsylvania is delegated the responsibility of locating, identifying and providing special education to handicapped students residing in their respective school districts. Public School Code of 1949, Act of 1949, March 10, P.L. 30, §1371, et seq., 24 P.S. §1371, et seq. As stated by the Commonwealth Court of Pennsylvania, "[s]ection 1371 of the Code, 24 P.S. §13-1372, imposes on school districts the primary duty to prepare and to submit to the Secretary of Education for approval, plans for the proper education and

training of all exceptional children and to provide and maintain special classes or schools in accordance with the approved plan." *Central York School District vs. Department of Education,* 41 Pa. Commonwealth Ct. 383, 386, 399 A.2d 167, 168 (1979). Further, the Court in *Frederick L. vs. Thomas,* 419 F. Supp. 960, 974 (E.D. Pa. 1976), aff'd. 557 F.2d 373 (3rd Cir. 1977), indicated that the obligation of Pennsylvania's school districts to provide appropriate educational services is imposed without regard to the adequacy of reimbursement for the cost of such services from the state or federal government. Consequently, judicial decisions interpreting 94-142 will impact directly upon Pennsylvania's five hundred and five (505) school districts and the cost effects of such decisions may be borne by those school districts. Therefore, as the association which represents the interests of Pennsylvania's public schools, the Pennsylvania School Boards Association is vitally concerned with the outcome of any litigation affecting the operation of the public schools and the costs of operating said schools.

With respect to the impact that this decision could have on costs, Robert Scanlon, Secretary of Education for the Commonwealth of Pennsylvania, testified on October 3, 1979, before the United States Senate Sub-Committee on the Handicapped, that the Commonwealth was then spending approximately $359.4 million in its educational efforts for handicapped children with only $45.3 million of that amount representing federal funds under 94-142. The impact of the District Court's orders, according to the testimony of Secretary Scanlon, would be to raise expenditures by $200 million to $500 million annually. Assuming that the increased costs resulting from the Circuit Court's order would be comparable, the impact upon Pennsylvania and

its local school districts, as well as upon the remaining states and Commonwealths of the United States, of the decision in this matter will no doubt be substantial.[1]

At a time when increased costs and dwindling resources are on a collision course, the Pennsylvania School Boards Association is compelled to aid in efforts to reverse a court decision which may very well weaken the nation's public school systems by unduly diverting funds from regular and other special programs. The public school system has limited, albeit substantial, funds with which to operate and the decisions reached in this matter will potentially divert a disproportionate amount of those funds to a rather limited aspect of the total educational program. It is in consideration of these factors and its commitment to preserve quality education for all students, both handicapped and non-handicapped, that the Pennsylvania School Boards Association is compelled to participate as an amicus curiae at bar.

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[1] Pursuant to the Circuit Court's order, the Commonwealth of Pennsylvania filed a motion to vacate the District Court's orders in this matter. By order dated October 27, 1980 the District Court denied said motion, holding that "no modification of the orders entered is necessitated by the Court of Appeal's ruling." Slip op. at 7.

STATEMENT OF THE CASE

This is a consolidation of three class action lawsuits brought on behalf of "[a]ll handicapped school age persons in the Commonwealth of Pennsylvania who require or who may require a program of special education and related services in excess of 180 days per year and the parents or guardians of such persons." *Armstrong vs. Kline,* 476 F. Supp. 583, 586 (E.D. Pa. 1979).

The aforesaid class action lawsuits were filed by five handicapped children and their parents on behalf of themselves and all those similarly situated against the Commonwealth of Pennsylvania, several Commonwealth officials, several public school districts and various of their officers, as well as several private schools. The plaintiffs alleged essentially that the Commonwealth violated plaintiff children's constitutional and statutory rights by denying them a free publicly funded education in excess of 180 days, which is the Commonwealth's school year for all students. Answers were filed by the defendants and extensive discovery was invoked by both sides. A hearing was held before District Judge Newcomer, who issued a decision and order on June 21, 1979, essentially granting the relief prayed for by the plaintiffs. Although the plaintiffs' claims were based upon (1) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794; (2) 94-142; (3) the special education sections of the Public School Code of 1949, Act of 1949, March 10, P.L. 30, §1371, et seq., 24 P.S. §13-1371, et seq.; (4) 45 C.F.R. Part 121a; and (5) 22 Pa. Code,

Chapters 13 and 171, the district court's opinion was based exclusively upon 94-142.

After the court's order of June 21, 1979, the following orders were entered by the district court:

(a) On July 15, 1979 and July 18, 1980, an order was entered enjoining defendants to maintain the named plaintiffs in specified programs, each of which exceeds 180 days per year and four of which extend 365 days per year;

(b) On August 1, 1979 remedial order No. 1 was entered requiring Defendant Scanlon to take certain actions to insure the provision of more than 180 days of education to a group of children identified as priority class members;

(c) On September 5, 1979 remedial order No. 2 was entered which required defendants and other educational agencies in Pennsylvania to take specific actions to provide the benefits of its opinion of June 21, 1979 to the entire class; and

(d) On September 6, 1979, final judgment was entered in favor of the plaintiffs.

Each of the aforesaid orders was appealed by one or more of the defendants to the Third Circuit Court of Appeals where said appeals were consolidated for purposes of briefing and argument. Argument was held on those appeals before a three-judge panel of the United States Circuit Court of Appeals for the Third Circuit on January 14, 1980. On July 15, 1980, the circuit court of appeals issued its opinion and order, per Judge Hunter with Judge Van Dusen concurring and Judge Sloviter concurring and dissenting, remanding these actions to the district court for

further proceedings consistent with the opinion of that court. Although the court of appeals held that Pennsylvania's inflexible refusal to provide more than 180 days of education for any child violates the terms of 94-142, the court of appeals rejected much of the reasoning applied by the district court.

In rejecting much of the district court's rationale, the circuit court ordered further consideration to be undertaken by the district court upon motion of the parties. Such a motion was filed by the Commonwealth of Pennsylvania to vacate the district court's orders. Said motion was denied, however, by the district court by order dated October 27, 1980.

Factually, each of the five named plaintiff children is handicapped; three being emotionally disturbed, one being mentally retarded and the last being characterized by plaintiffs as a severely and profoundly impaired child suffering a degenerative genetic disorder. Pursuant to 94-142, the Commonwealth has given each child special education and related services for 180 days per school year (which is the length of the regular school year in Pennsylvania), but has refused to fund or to consider providing any programs in excess of 180 days. When programming was provided by the Commonwealth to the plaintiffs, educational progress was made by each of the children. However, each child experienced a degree of regression during breaks or interruptions in his/her program which was allegedly greater than that experienced by "normal" children. It was because of this regression that the plaintiffs claimed that their rights were being violated and that they were entitled to programming in excess of 180 days.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of federal law which has not been, but should be, settled by your Honorable Court. The question affects hundreds of thousands of handicapped students across the nation, significantly impacts upon the costs of public education, ultimately involves the basic mission of this nation's public schools, impacts upon the federal-state relationship in the area of public education and affects the gloss to be given to equal protection guarantees in the realm of public education for the handicapped. Further, although the specific question to be decided in this case—namely, the legality of Pennsylvania's 180 day rule—is ostensibly narrow, in view of the utter lack of statutory specificity in defining the phrase "free appropriate public education",[2] a deci-

[2] 94-142 defines the phrase "free appropriate public education" at 20 U.S.C. §1401(18). However the statutory definition is only minimally helpful in actually defining in any given situation what sort of educational program is required. It provides no guidance, for example, as to the length of the program, class size, curriculum content, required services or any other specific educational item, leading one commentator to note:

> "Although the Act sets forth general requirements states must meet in order to qualify for receipt of federal funds, it does not prescribe the specific educational programs local schools must make available in order to fulfill those requirements. Instead, the heart of the federal control mechanism is a system of procedural safeguards which provides for parental involvement in educational placement decisions. In effect, the Act guarantees procedures whereby parents may challenge the

sion by your Honorable Court will serve to provide a much needed analytical model for the future determination of whether any given program or service is required under 94-142. For these reasons, a writ of certiorari should be granted.

A. The proper mission of public schools:

One cannot appreciate the nature and importance of this case unless one looks beyond the pleadings, the evidence and the briefs and recognizes this case for what it is—to wit, a test to determine the proper mission of the public schools of this nation. The extent to which the plaintiffs claim that the mission of the public schools has been altered can best be appreciated by considering the plaintiffs' motive in arguing that educational programming in excess of state standards is necessary. Speaking through their experts, the plaintiffs contend that year-round educational programming is necessary for a variety of reasons. One expert testified that a student who needed physical therapy would need year-round programming (N.T. 3-50).

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appropriateness of their child's educational program, but provides only the most general guidelines for resolving the substantive questions such challenges may present."

The Education for All Handicapped Act of 1975, 92 Harv. L. Rev. 1103 (1979).

One court noting the lack of statutory specificity said: "it has been left entirely to the courts . . . to give content to the requirement of an 'appropriate education'." *Rowley vs. Hendrick Hudson School District*, 483 F. Supp. 528, (S.D.N.Y. 1980), *aff'd.* (with notation to cite) F.2d (2d Cir. 1980), 3 EHLR 522:101. (EHLR refers to the Education for the Handicapped Law Report published by CRR Publishing Company, Washington, D.C.)

Another testified that children who have not developed a real image of themselves or who exhibited abusive sexual behavior would need year-round programming (N.T. 4-62-63). A third testified that one of the named plaintiffs needed a year-round residential placement because she needed as much peer interaction as possible (N.T. 6-49). Perhaps most shocking, from the context of the proper mission of public schools, is the testimony of the fourth expert, indicating that year-round residential placement is necessary where there is a possibility of child abuse or a danger to the family (N.T. 6-9). However, it is suggested that it never has been, and 94-142 does not make it, the objective of the schools to insure proper peer interaction, to develop a child's self-respect or to eliminate abusive sexual behavior. Certainly, the mission of our schools is not to protect the child from child abuse or the family from a disruptive child. Therefore, to the extent that the decisions of the lower courts at bar leave the door open to the contention that specific programs or services are required to fulfill certain "needs" of children which traditionally have not been met by the public school system with respect to any child, handicapped or non-handicapped, the basic and fundamental mission of the public schools most certainly will be altered. A decision from your Honorable Court is therefore necessary to forge the parameters of this most important aspect of the case.[3]

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[3] On this point, the Commonwealth essentially contends that proper mission of public schools is to provide equal educational opportunity to all school aged children, handicapped and non-handicapped alike, and that this basic mission was not altered by Congress in its enactment of 94-142. On the other hand, the plaintiffs contend that Congress altered the mission of public schools by enacting 94-142 and that, with respect to handicapped students, the

B. The need for an analytical model:

1. *There is a lack of uniformity among the courts.*

Although this area of the law is in its infancy, the cases thus far adjudicated in the federal courts under 94-142, involving claims that handicapped students are not being provided with a "free appropriate public education", have not reached uniform results either in the analysis of the problem or in the definition of the phrase "free appropriate public education". Not only is there an inconsistency among the various courts that have had to address the problem, but there is a difference of opinion within courts. Indeed, three separate opinions were written by the circuit court below with Circuit Judge Sloviter concurring and dissenting.

To illustrate the necessity of having a statement from your Honorable Court as to the proper method of analyzing the mandates of 94-142, it is perhaps appropriate to recite how various courts and judges have dealt with the problem of adjudicating disputes under 94-142.

Beginning with the case at bar, Judge Newcomer analyzed 94-142 requirements using the following standards:

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public schools must guarantee a level of services that would insure maximum achievement in the area of self-sufficiency regardless of costs, without regard to the educational product that it actually achieved in striving for that goal, and without limitation. Indeed, counsel for plaintiff Armstrong on page 19 of its brief before the circuit court argued, "[t]he definitions of 'free appropriate education' and 'special education' convey the intention of Congress to have every handicapped child educated *without limitation.*" (Emphasis added.) Similarly, on page 20 of its brief before the circuit court, counsel for plaintiffs Battle and Bernard argued "[c]ontrary to the appellant Scanlon's position the Act and its purpose are not 'limited'."

> "[T]he Act appears to demand that the state supply instruction designed to meet all of the handicapped child's 'unique needs' without limitation. * * * To determine which unique needs of the handicapped child must be met . . . , it is useful to approach the problem by asking what is the goal of the education that the Act requires the state to provide. * * * The congressional intent was to provide for that education which would leave these children, upon school's completion, as independent as possible. . . ." 476 F. Supp. at 603-604.

In contrast, the circuit court below adopted a "process of comparison" for analyzing the appropriateness of an educational program. While not denominated as such by the court, this "process of comparison" was set forth by the circuit court in paragraphs 22, *et seq.* of its opinion. Essentially, it takes the following form:

> (a) The educational goals of the non-handicapped must be considered;
>
> (b) to the extent that the handicapped can attain those goals, the programs and services necessary to enable the handicapped to reach those goals must be provided; and
>
> (c) to the extent that the handicapped cannot attain those goals, the states must adopt reasonable goals for the handicapped and provide reasonable modes for achieving those goals.

In contrast to the aforesaid analyses, the district court in *Rowley vs. Board of Education of the Hendrick Hudson School District, supra,* conceptualized the problem as follows:

> "An 'appropriate education' could mean 'adequate' education—that is, an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn high school diploma. An 'appropriate education' could also mean one which enables the handicapped child to achieve his or her full potential. Between these two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the equal protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. 483 F. Supp. at 534.

Although the Second Circuit Court of Appeals apparently affirmed this standard, the majority did so with the admonition that its decision may not be cited as authority in any other case. F.2d at , 3 EHLR 552 at 102-103. Further, Circuit Court Judge Mansfield, in a dissenting opinion, stated that the foregoing standard is "an erroneous and impractical guideline or standard for determining whether a handicapped child's education is 'appropriate' within the meaning of the pertinent sections of the Act. . . ." F.2d at , 3 EHLR 552 at 103. Peculiarly enough, the standard that would be adopted by Circuit Judge Mansfield is somewhat similar to the standard adopted by Judge Newcomer at bar, but which was rejected by the circuit court majority below. Judge Mansfield's standard was couched in the following terms:

> "The language and legislative history of the Act demonstrate that Congress visualized a much more

> practical objective, i.e., an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her non-handicapped classmates." 3 EHLR 552 at 106.

Consequently, there are no less than three analytical approaches that have been utilized by the courts in determining the appropriateness of an educational program. We suggest that the judicial recognition of these different approaches will confound educators and the courts alike until and unless certain direction is given by your Honorable Court.

2. *The standard adopted by the Court below is unworkable and unsupported by the Act.*

Principally, the circuit court opinion below is based upon a "needs" analysis which the court defines in the context of educational goals and the pursuit of those goals. However, as recognized by your Honorable Court and by other courts, a legal standard based upon educational needs and goals is unworkable because of the myriad of factors impacting and influencing the effects of an educational program.

In *McInnis vs. Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd. sub nom. McInnis vs. Ogilvie,* 394 U.S. 322 (1969), citing *Reynolds vs. Simms,* 377 U.S. 533 (1964), the court dismissed an action as non-justiciable because it found that there were "no 'discoverable and manageable standards' by which a court [could] determine when" the

law was being violated. 293 F. Supp. at 335. Similarly, in *Peter W. vs. San Francisco Unified School District,* 60 Cal. App. 3d 867, 131 Ca. Rpt. 854 (1976), and *Donahue vs. Copiaque Union Free School District,* 407 NYS 2d 874 (App. Div. 1978), the courts held that educators may not be sued for damages by an individual for an alleged failure to reach certain educational objectives because there are no judicially manageable standards. As the court said in *Peter W. vs. San Francisco Unified School District, supra,* "[u]nlike the activity of the highway or the market place, classroom methodology affords no readily acceptable standards of care, or cause or injury." 131 Cal. Rtpr. at 860.

In *McInnis vs. Shapiro, supra,* public school pupils in Cook County, Illinois, challenged the constitutionality of that state's education financing statutes on the ground that said statutes permitted wide variations in per-pupil expenditures from school district to school district. Implicit in the plaintiffs' argument, as found by the court, was the theory that only a financing statute which distributed school funds in proportion to the educational *needs* of the students was required by the Constitution. 293 F. Supp. at 331. Dismissing this argument, the court recognized that due to a variety of factors, it could not determine when the educational needs of the students were being met. The factors relied upon by the court in reaching this conclusion were varying efficiencies, shifting problems and technological advancements. The court couched these concepts as follows:

> "A dollar spent in a small district may provide less education than one used in a large district. As stated above, costs vary substantially throughout the state. The desirability of a certain degree of local ex-

perimentation and local autonomy in education also indicates the impracticability of a single, simple formula. Effective, efficient administration necessitates decentralization so that local personnel familiar with the immediate needs, can administer the school system. As new teaching methods are devised and as urban growth demands changed patterns of instruction, the only realistic way the state can adjust is through legislative study, discussion and continuing revision of the controlling statutes." *Id.* at 336.

In *Peter W. vs. San Francisco Unified School District, supra,* much the same analysis was employed by the court. In that case, a high school graduate brought an action against the school district seeking to recover for alleged negligence on the part of the school district which deprived him of basic academic skills. In declaring the impossibility of establishing a duty of care, the court noted the following:

> "The science of pedagogy, itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject. The 'injury' claimed here is the plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

We find in this situation no conceivable 'workability of a rule of care' . . . ." 131 Cal. Rpt. at 860-861.

See also, Donahue vs. Copiaque Union School District, supra, for a similar analysis.

In the instant case, a handicapped pupil's success in achieving educational goals is affected by a host of factors unrelated to the number of days of educational programming that are provided. This concept, being a truism, was naturally agreed to by all experts testifying in this case. Indeed, the district court found as follows:

> "From the expert testimony, the Court concludes that several factors have an impact on whether and at what rate a child learns. Surely, one of the most important and an immutable one is the nature and characteristics of the child's handicap. In many ways, this factor defines the boundaries for learning. But other factors operate to affect the handicapped child's educational experience and can have a significant impact on it. Teacher competency is certainly one of them. So, too, is the functionality of the skill being taught; if the skill is one that can be performed outside the classroom, the chances that it will be learned and learned at a quicker rate than otherwise possible increases. Along these lines, the opportunity to practice outside the formal classroom is a significant factor. And finally, to some unknown extent, the length of time that a child has to practice a skill increases the likelihood that the skill will be mastered." 476 F. Supp. at 592.

Consequently, in view of the multitude of factors affecting educational success, a standard based upon a "needs-goals" analysis is unworkable.

Reasons for Granting the Writ

A second weakness or error found in the circuit court's analysis is the court's defining the "unique needs" of the child in the context of educational goals. There is no statutory support for such an analysis and we submit that the "unique needs" of a child is to be defined in the context of a child's handicapping condition, not in the context of educational goals. When 94-142 requires states and school districts to provide special education which meets the "unique needs" of the child, 20 U.S.C. §1401 (16), the Act is requiring simply that the handicapping condition of the student is to be taken into consideration. It means, for example, that the states may not use visual aides for a child that is blind; rather, it means that braille must be provided.[4]

[4] In March, 1980, the National Learning Resource Center of Pennsylvania (which operates through a federally funded contract from the Bureau of Education of the Handicapped, Washington, D.C.), in conjunction with the Bureau of Special Education of the Pennsylvania Department of Education, published a book entitled "Individualized Education Program Plans in Pennsylvania: Guidelines for School Age I.E.P. Development." At page 10 of said publication, student needs to be addressed by I.E.P.'s were characterized as follows:

> "The I.E.P. Plan contains three required components that provide information to be used in the decision process. These include a description of student needs related to curriculum, related services, and special instructional media and materials. Other types of student needs should be considered such as learning type, social/psychological characteristics, and physical limitations."

See, Rowley vs. Board of Education of Hendrick Hudson Central School District, supra, where it was said that "[w]hile it is true that the law requires that the needs of each individual handicapped child be assessed, and in keeping with that goal eschews any general formulations or guidelines, as a practical matter those needs cannot be assessed without reference to generally accepted methods of special education for the handicapped." 483 F. Supp. at 535.

A third error in the approach of the court below is its equating of "state standards" with state "goals".[5] 94-142 specifically defines a "free appropriate public education" as meeting "state standards", 20 U.S.C. §1401(18), yet the circuit court stated that "the Act contemplates that in the first instance each state shall have the responsibility of setting individual educational goals and reasonable means to attain those goals." (Slip Opinion at p. 17). (*See also,* Slip Opinion at p. 22). However, there is nothing in the Act to support the court's position that "standards" means "goals" and we contend that it does not. Instead, we submit that standards connotes such things as class size, length of school day, curriculum requirements, teacher qualifications, and, in view of this lawsuit, the length of the school year. We submit that "state standards" has little, if anything, to do with educational goals and, to the extent that the circuit court equates state standards with goals, it ignores the fact that a free appropriate public education is to be defined, in part, in the context of state standards.

A fourth error in the lower court's analysis is that if the court is correct, that states may establish goals and the means of achieving those goals, it cannot be determined until such goals are established whether Pennsylvania's 180 day rule precludes any child from reaching said goals. It is suggested that if the goal of Pennsylvania is to provide simply for beneficial or functional programs, which

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[5] It is clear that the circuit court intends goals to mean the ends or objectives that the educational program is going to attain individually for each handicapped child. The court below does not intend "goals" to mean, for example, the type or quality of educational system that the state would choose to provide.

is all that equal protection requires,[6] then the 180 day rule is valid.[7] It has been established that each child does

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[6] In *San Antonio Independent School District vs. Rodriquez*, 411 U.S. 1 (1973), the Texas school financing system survived an equal protection attack because it provided "each child with an opportunity to acquire the basic minimal skills" even though it created an environment in which some students benefited more than others. In *Frederick vs. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976), the court held that an equal protection claim was stated because the plaintiffs alleged that they could not "derive any educational benefits" from the program that they were provided. *Id.* at 835. In *Fialkowski vs. Shapp*, 405 F. Supp. 946 (E.D. Pa. 1975), the court held that an equal protection claim was stated because the plaintiffs alleged that "their children are being denied educational opportunities", noting that "there existed constitutional rights to a certain minimal level of education as opposed to a constitutional right to a particular level of education." *Id* at 958. Similarly, in *New York State Association for Retarded Children vs. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), the court noted that "a state is not constitutionally required to provide the mentally retarded with a certain level of special education." *Id.* at 763. In *Sherer vs. Waier*, 457 F. Supp. 1039 (W.D.Mis. 1977), a motion to dismiss by the defendants was sustained because the complaint [did] not allege that the defendants have denied Plaintiff Kimber Sherer any education, but rather that defendants have refused to provide special services to her. . . ." *Id.* at 1047-1048. In *Doe vs. Koger*, 480 F. Supp. 225 (N.D.Ind. 1979), the court said that "[t]he equal protection clause does not require a state to guarantee more education to students with a greater need of education." *Id.* at 230. Finally, in *Mills vs. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.C.D.C. 1972), the court held that insufficient funds were available to fund optimally both regular and special education programs. Equal protection simply prohibits states from burdening the handicapped with a disproportionate share of the cutbacks.

[7] Judge Van Dusen apparently agrees with this proposition. As pointed out in footnote No. 1 of the majority opinion below,

benefit from the educational program provided by the Commonwealth. Each program has advanced each child's skills or improved behavior. It was not held otherwise by the district court. None was being either "functionally" or "effectively" precluded from a beneficial educational program.

Therefore, it appears that the standard adopted by the court below, in addition to being different from standards adopted by other courts, is unworkable and based upon several faulty premises. Consequently, the intolerable situation of Pennsylvania's public school system being compelled to operate under a confounding and faulty standard must be rectified by your Honorable Court.

C. 94-142 was enacted to enforce equal protection guarantees:

We submit that the standard to be applied in determining whether any given program fulfills the mandates of 94-142 is the same standard that courts have utilized in determining whether an educational program has fulfilled the equal protection clause of the Federal Constitution. In other words, if equal protection is not being violated, neither is 94-142.

There is strong evidence that Congress enacted 94-142 simply and solely to enforce the equal protection

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Judge Van Dusen would restrict those eligible for programs in excess of 180 days to those students whose "over-all progress for the year [is brought] to a virtual standstill" without the extended program (Slip Opinion at p. 6, n. 1, p. 29).

clause.[8] In Section 3(a) of 94-142, Congress stated the following:

> "(9) it is in the national interest that the federal government assist state and local efforts to provide programs to meet the educational needs of the handicapped children in order to assure equal protection of the law." 20 U.S.C. §1401, n.

Similarly, in Senate Report No. 94-168, it was reported that 94-142 was enacted in the belief "that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunities." S. Rep. No. 94-168, 94th Cong., 1st Sess. [1975], U.S. Code, Cong. & Admin. News 1433. That Senate Report also stated that 94-142 was developed because Congress "recognizes the State's primary responsibility to uphold the Constitution of the United States and their State Constitutions and State laws as well as Congress' own responsibility under the 14th Amendment to assure equal protection of the law." *Id.* at 1446. At another point in the Senate Report it was said that, "it is this [unconstitutional] discriminatory treatment and exclusion which Court cases, State and Federal laws are designed to remedy." *Id.* at 1451. Consequently, we con-

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[8] As was noted in *Ex Parte Virginia,* 100 U.S. 339 (1879), "Congress is authorized to *enforce* the prohibitions [of the 14th Amendment] by appropriate legislation. Some legislation is contemplated to make the amendments [to the Constitution] fully effective." 100 U.S. at 345 (emphasis supplied by the Court). *See also, Katzenbach vs. Morgan,* 384 U.S. 641 (1966), where the Court held that the Voting Rights Act of 1965 was enacted to enforce the 14th Amendment.

tend that Congress intended only to stimulate compliance with the equal protection clause of the Federal Constitution through the enticement of federal awards to the state. It is submitted that it is against this backdrop that all the provisions of 94-142 must be read.

Regretably, 94-142 was not so interpreted by either court below. We submit that the lower courts' failure to so interpret 94-142 renders the courts' interpretation suspect. We further submit that if 94-142 is to be so interpreted, it must be established by Your Honorable Court presently so that future cases necessitating a proper interpretation of 94-142 may be interpreted pursuant to a correct analysis.[9]

D. Impact upon Federal-State relations:

Local control over public education is a national staple with which Congress has been cautious not to interfere and which your Honorable Court has jealously pro-

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[9] If 94-142 was to be interpreted in the context of equal protection, this matter will afford the court with a vehicle by which the nature and extent of equal protection guarantees in the field of educating the handicapped can be portrayed. Although there are numerous district court decisions applying equal protection to handicapped students, the precise bounds of the equal protection guarantees as applied to handicapped students have not been dictated by your Honorable Court. *E.g., Fialkowski vs. Shapp,* 405 F. Supp. 946 (E.D. Pa. 1975); *Frederick vs. Thomas,* 408 F. Supp. 946 (E.D. Pa. 1976); *Mills vs. Board of Education for the District of Columbia,* 348 F. Supp. 866 (D.C.D.C. 1972); *New York State Association for Retarded Children vs. Rockefeller,* 357 F. Supp. 752 (E.D. N.Y. 1973); *Pennsylvania Association of Retarded Children vs. Commonwealth of Pennsylvania,* 343 F. Supp. 297 (E.D. Pa. 1974).

tected, but which is being threatened by the opinions below. With each state standard, such as Pennsylvania's 180-day rule here, that is cast aside through interpretation of 94-142 mandates, the traditional prerogatives of states and local school districts will be eroded. Therefore, an opinion should be expresseed by your Honorable Court whether and to what extent the traditional local prerogatives of states and local school districts have been displaced by 94-142.

In this vein, the Pennsylvania School Boards Association contends that the 180-day standard adopted by Pennsylvania is a proper standard and of the nature which Congress intended should remain within the authority of school districts and states. We suggest that Congress specifically qualified 94-142 to require only what is required by the standards of the state educational agency to reflect its continued commitment to preserve local authority and to prevent 94-142 from becoming a national school code for the handicapped, a commitment which was expressed in 1965 by Congress as follows:

> "It is the intention of the proposed legislation [i.e., the Elementary and Secondary Education Act, P.L. 89-750, one of the precursors to 94-142] not to prescribe the specific types of programs or projects that will be required in school districts. Rather, such matters are left to the discretion and judgment of the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from State to State and district to district. * * * There may be circumstances where . . . the best approach in meeting

the needs of educationally deprived children would be to upgrade the regular programs." S. Rep. No. 146, 89th Cong. 1st Sess. [1965] U.S. Code, Cong. & Admin. News 1434.

This sentiment was echoed ten years later by the Senate Committee on Labor and Public Welfare when it stated that:

> "The bill requires that the state educational agency is responsible for . . . the general supervision of educational programs for handicapped children within the state. . . ." S. Rep. No. 94-168, *supra,* at 1441.

Congress thus clarified that neither it nor the Department of Health, Education and Welfare would be responsible for the general supervision of educational programs, such being the function of the states.

Commenting upon 94-142, one writer stated the following:

> "Perhaps the most significant reason Congress failed to prescribe more specific standards is the traditional notion that education is primarily a state and local concern. Despite the far-reaching procedural provisions of the present statute, Congress was apparently unwilling to take the further step of ordering that specific programs be made available—a process that could lead to federal allocation of state and local funds. In the end, the hard choices required to determine the extent of the rights of particular children were consigned to the discretion of local administrators. . . ." *Enforcing the Right to an Appropriate Education,* 92 Harv. L.R. at 1109.

These same concepts were repeatedly recognized by your Honorable Court. In *Milliken vs. Bradley,* 418 U.S. 712, 741-742 (1974), the Court said:

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process. See, Wright vs. Council of the City of Emporia, 407 U.S. 451, 469. Thus, in San Antonio School District vs. Rodriquez, 411 U.S. 1, we observed that local control over the education process afford citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs and encourages 'experimentation, innovation and a healthy competition for educational excellence',"

In *San Antonio School District vs. Rodriquez,* 411 U.S. 1, 50 (1973), chronicling the benefits of local control over educational programming, the court said:

> "Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation and a healthy competition for educational excellence. An analogy to the nation-state relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory, and try novel social and economic experiments'. No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."

Unfortunately, the continued viability of these concepts is being subjected to question in view of the lower courts' opinions at bar.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Harrisburg, Pennsylvania